

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM: [REDACTED] POSTF-134085-02
[REDACTED]

date: **AUG 7 2002**

to: [REDACTED], Team Manager, Team [REDACTED]
[REDACTED]

from: Associate Area Counsel (LMSB: CTM)
[REDACTED]

subject: **Request for Assistance**

Taxpayer: [REDACTED]

TIN: [REDACTED]

Tax Years: [REDACTED] and [REDACTED]

This memorandum supplements our previous advice in this case as contained in our memorandum dated July 10, 2002. This memorandum should not be cited as precedent.

Upon post-review of the July 10, 2002, memorandum, our National Office has agreed that as to issue no. 2 (whether a summonsed witness is entitled to be provided with a transcript or copy of the recording of his interview pursuant to I.R.C. § 7521(a)(2)(B) and Notice 89-51?), section 7521 does not entitle a summonsed witness to a transcript or copy of the recording of his interview. But they have determined that the legislative history to the Administrative Procedure Act, 5 U.S.C. § 551 et seq., requires that if a transcript of the recording is not made, the Service should provide the summonsed witness with a copy of the recording upon payment of the cost of making such copy. (Our National Office has also indicated that the summonsed witness cannot compel the Service to transcribe the recording.)

Further, our National Office has also agreed that the Service-prescribed power of attorney form, Form 2848, is not required in this case. The rules of agency apply here to allow [REDACTED] to receive a copy of the recording as the facts indicate that [REDACTED] has expressly authorized him to do so.

If you have any questions, please call me at ([REDACTED]) [REDACTED].

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

[REDACTED]
Area Counsel
(Communications, Technology, and Media:
[REDACTED]

By:

[REDACTED]
Associate Area Counsel
(Communications, Technology, and Media:
[REDACTED]

cc: [REDACTED] post of duty

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM: [REDACTED]; POSTF-134085-02
[REDACTED]

date: July 9, 2002

to: [REDACTED], Team Manager, Team [REDACTED]
[REDACTED]

from: Associate Area Counsel (LMSB: CTM)
[REDACTED]

subject: **Request for Assistance**

Taxpayer: [REDACTED]

TIN: [REDACTED]

Tax Years: [REDACTED] and [REDACTED]

This memorandum responds to your request for assistance made by Charles O'Brien during our meeting on June 24, 2002. This memorandum should not be cited as precedent.

ISSUES:

1. Whether a statement by a purported client on a letter from an attorney constitutes a valid power of attorney?
2. Whether a summonsed witness is entitled to be provided with a transcript or copy of the recording of his interview pursuant to I.R.C. § 7521(a)(2)(B) and Notice 89-51?

CONCLUSIONS:

1. No. The Service will accept a form other than the prescribed power of attorney form only if that form contains certain information, which this statement does not. The present circumstances, however, may not require the attorney to present a power of attorney.
2. Neither section 7521(a)(2)(B) nor Notice 89-51 entitles the summonsed witness to be provided with a transcript or copy of the recording of his interview.

FACTS:

Our advice is contingent on the accuracy of the information that the Internal Revenue Service has supplied. If any information is uncovered that is inconsistent with the facts recited in this memorandum, you should not rely on this memorandum, and you should seek further advice from this office.

On January 10, 2002, the assigned revenue agent issued a summons to [REDACTED] ([REDACTED]) in the matter of [REDACTED] ([REDACTED]) for the tax years ended December 31st of [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] had been [REDACTED]'s return preparer for the years at issue and had prepared returns for [REDACTED]'s personal holding company, [REDACTED], Inc., as well as for [REDACTED], Inc., of which [REDACTED] was and continues to be a corporate officer. But [REDACTED] had never been an employee of [REDACTED], of [REDACTED] Inc., or of [REDACTED], Inc. In the past, [REDACTED] was an enrolled agent under the provisions of Treasury Department Circular No. 230, but he may not retain that status currently as he has ceased doing business as a return preparer.

On [REDACTED], [REDACTED] appeared in response to the summons and was interviewed by the revenue agent. [REDACTED] had been notified at least ten calendar days beforehand by means of Pattern Letter P2156 that the Service would record the interview. The [REDACTED] interview was in fact recorded by the Service, but the recording has yet to be transcribed. [REDACTED] was represented at the interview by an attorney named [REDACTED] ([REDACTED]), who admitted during the interview that he was being paid by [REDACTED] to represent [REDACTED]. [REDACTED] did not present the revenue agent with either a Form 2848 (Rev. 01/2002), Power of Attorney and Declaration of Representative, or a Form 8821 (Rev. 01/2000), Tax Information Authorization, or any other evidence of authorized representation. His claim of authorization was based solely on his oral statements and on [REDACTED]'s apparent acquiescence in his presence at the interview. Further, the revenue agent did not inquire into issues of dual representation. (We assume for purposes of this opinion that [REDACTED] is recognized to practice before the Service, [REDACTED] area, is a partner with a prominent tax law firm, and is a former Counsel attorney, all factors making it extremely likely that he appreciates the requirements of such recognition and has taken the necessary steps to obtain it.)

By a letter dated [REDACTED], [REDACTED] requested a transcript of the March 7th interview and copies of all documents referred to during the interview. At the bottom of the letter was the following statement: "THIS IS TO AUTHORIZE MY ATTORNEY, [REDACTED], TO MAKE THE ABOVE REQUEST ON MY BEHALF. PLEASE PROVIDE HIM THE REQUESTED INFORMATION." This statement was dated [REDACTED] and was purportedly signed by [REDACTED]. No reimbursement accompanied the letter.

ANALYSIS:

Issue no. 1:

Pursuant to the Statement of Procedural Rules, the Service will accept a power of attorney other than Form 2848, but it must contain the following information: the taxpayer's name and mailing address; the taxpayer identification number; the name and mailing address of the representative; the types of tax involved; the Federal tax form number; the specific years or periods involved; a clear expression of the taxpayer's intention as to the scope of the authority granted to the representative; and the taxpayer's signature and date. Treas. Reg. § 601.503(b)(2); see also Pub. 947, Practice Before the IRS and Power of Attorney.

Further, the representative must also attach to the power of attorney a signed and dated statement declaring the following:

(1) I am not currently under suspension or disbarment from practice before the Internal Revenue Service or other practice of my profession by any other authority;

(2) I am aware of the regulations contained in Treasury Department Circular No. 230 (31 C.F.R., part 10), concerning the practice of attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others;

(3) I am authorized to represent the taxpayer(s) identified in the power of attorney; and

(4) I am an individual described in § 601.502(b).

Treas. Reg. § 601.502(c).

Obviously, the [REDACTED] letter does not meet these requirements, and therefore it cannot be treated as a valid power of attorney. But we must then determine whether a power of attorney is even required in these circumstances.

A power of attorney is required when the taxpayer wishes to authorize a recognized representative to perform the various acts described in Treasury Regulation section 601.504(a), such as executing a waiver of the restrictions on assessment or collection of a deficiency in tax; executing a consent to extend a period of limitations; or receiving a check drawn on the United States Treasury. The only designated act that may be considered relevant to these facts is that of "Representation," see Treas. Reg. § 601.504(a)(1), and that provision refers, in turn, to Treasury Regulation sections 601.501(b)(10), *Practice before the Internal Revenue Service*, and 601.501(b)(13), *Representation*.

Treasury Regulation section 601.501(b)(10) states:

Practice before the Internal Revenue Service encompasses all matters connected with presentation to the Internal Revenue Service or any of its personnel relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include the preparation and filing of necessary documents, correspondence with and communications to the Internal Revenue Service, and the representation of a taxpayer at conferences, hearings, and meetings. (See 31 CFR 10.2(a) and 10.7(a)(7).)

(Emphasis added.)

Treasury Regulation section 601.501(b)(13) defines "Representation" as:

Acts performed on behalf of a taxpayer by a representative in practice before the Internal Revenue Service. (See § 601.501(b)(10).) Representation does not include the furnishing of information at the request of the Internal Revenue Service of any of its officers or employees. (See 31 CFR 10.7(c).)

(Emphasis added.)

From the use of the specific term "a taxpayer" in both definitions and from their general contexts, we conclude that an attorney representing a summonsed witness is not required to present a power of attorney, as that attorney is not representing the witness in the capacity of a taxpayer. Further, the scope of the rules that govern Subpart E - Conference and Practice Requirements, Treas. Reg. §§ 601.501-601.509, is limited to "the representation of taxpayers." Treas. Reg. § 601.501(a). Finally, the Internal Revenue Manual provision requiring that a witness appearing in response to a summons be afforded the opportunity to be represented by an attorney gives no indication that such an attorney must present a power of attorney, as would be the case if the attorney were representing a taxpayer.¹

¹ Our conclusion also finds persuasive authority in Revenue Procedure 68-29, which allows the Service to deal with a person employed by the taxpayer in the capacity of a "witness" in order to receive information that will assist in the factual development

As a result of all the foregoing, we conclude that [REDACTED] is not required to present a power of attorney.

Issue no. 2:

Section 7521(a)(2)(B) requires that the Service must provide a requesting taxpayer with a transcript or copy of the recording of any in-person interview with any taxpayer so long as reimbursement is provided by the taxpayer for the cost of transcription or reproduction. Notice 89-51 provides detailed guidance as to how such requests should be processed. Section (d)(3) of the notice requires that when the Service intends to record the interview with the taxpayer, notice of such recording must be given no later than ten calendar days prior to the interview.² Section (d)(4) of the notice states that requests by taxpayers or their authorized representatives for a transcript or copy of the recording of the interview must be made no later than thirty calendar days after the interview, although the Service will attempt to accommodate requests after that date. Further, all requests must be accompanied by reimbursement.

Neither section 7521 nor its legislative history define "in-person interview with any taxpayer." Notice 89-51 defines "taxpayer interview" as "a meeting with an officer or employee of the Examination function, the Employee Plans and Exempt Organiza-

¹(...continued)

of a case. Such a witness is not engaging in "practice before the Internal Revenue Service," so long as the witness refrains from advocating particular positions on issues. The Service therefore recognizes a certain hierarchy of contacts, with the most formal, of course, being those involving the taxpayer in question or a recognized representative, in which latter case a power of attorney is clearly required. Below that level are contacts involving those persons simply providing information. Assuming, then, that the focus of the interview with the witness is factual development, an attorney's actions in representing the witness should not generally be considered practice before the Internal Revenue Service. Quite conceivably, however, an attorney who is representing a summonsed witness could, for example, raise and argue a matter of privilege. See, e.g., IRM Summons Handbook, 25.5.5.4.6(2). But in this case, the revenue agent has not indicated that [REDACTED] made any such argument or, for that matter, any other legal argument, and consequently, we will not consider that circumstance.

² Typically, such notice is provided, as it was in this case, by means of Pattern Letter P2156, a standard form that states the intent of the Service to record the interview on a certain date, that advises the taxpayer of the right to also record the interview, and that advises the taxpayer that a transcript or copy of the recording of the interview may be requested, provided that such request is in writing, is received within thirty calendar days of the interview, and is accompanied by payment in full by check or money order.

tion function, or the Collection function of the Service, and a taxpayer or authorized representative, as defined in section 7520(b)(2) [now section 7521(b)(2)], when the determination of tax is at issue." (Emphasis added.) The Internal Revenue Manual, in discussing section 7521 and requests to tape record interviews, refers only to "Taxpayers" and "the taxpayer." IRM 4.10.3.2.5, *Requests to Tape Record Interviews*. And in discussing third party interviews, the Manual makes no reference to requests to tape record or to the obtaining transcripts or copies of recordings. See IRM 4.10.3.2.1.4, *Third Party Interviews*.

Consequently, we conclude that neither section 7521 nor Notice 89-51 provides any entitlement to [REDACTED] for a transcript or copy of the recording as he is not the taxpayer.³ We also find no entitlement to the documents referred to in the interview.

If you have any questions, please call me at ([REDACTED]) [REDACTED]

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

[REDACTED]
Area Counsel
(Communications, Technology, and Media:
[REDACTED])

[REDACTED]
Associate Area Counsel
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San Diego)

cc: [REDACTED] post of duty

³ The receipt of Pattern Letter P2156 does not entitle [REDACTED] to the benefits of section 7521 or Notice 89-51. Just as the improper noticing of a taxpayer with regard to service of a summons on a third party who was not in fact a third-party recordkeeper under the prior version of section 7609 did not confer rights of standing in a proceeding to quash, *Munsell v. United States*, 651 F. Supp. 698, 699-700 (D. Nev. 1986), the erroneous mailing to [REDACTED] cannot entitle him to a transcript or copy of the recording.